

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
CASE TYPE: CIVIL/CONTRACT

Walter Byrd, on behalf
of himself and all others
similarly situated,

Court File No.: CT 00-016055

Plaintiff,

**PROPOSED SECOND AMENDED
CLASS ACTION COMPLAINT**

v.

Metropolitan Corporation d/b/a
Prestige Lincoln Mercury, Co.
and all Related Dealerships,

Defendants.

As for his Complaint against Defendants, Plaintiff states and alleges as follows:

I. PARTIES

1. Plaintiff Walter Byrd is a natural person currently residing in the City of Minneapolis, County of Hennepin, State of Minnesota. Plaintiff is a “retail buyer” as defined by Minn. Stat. § 168.66 subd. 7.
2. Defendant Metropolitan Corporation d/b/a Prestige Lincoln Mercury, Co. is a Minnesota corporation with its principal place of business located at 6561 Wayzata Boulevard, City of Minneapolis, County of Hennepin, State of Minnesota. Defendant Barnett is a “retail seller” as defined by Minn. Stat. § 168.66 subd. 6.
3. Defendants Related Dealerships, upon information and belief, are Minnesota Corporations, with their principal places of business in Minnesota. The related Dealerships are “retail sellers” as defined by Minn. Stat. § 168.66, subd. 6.

4. Plaintiff alleges, based upon information and belief, that each of the Defendants designated herein as a Related Dealership has committed and is legally responsible for the unlawful acts referred to herein. Plaintiff will seek leave of the Court to amend this Complaint to reflect the true names and capacities of these related dealerships when such identities and numbers become known.

II. CLASS ALLEGATIONS

5. Plaintiff brings this class action against Defendants on behalf of himself and other persons similarly situated pursuant to Minnesota Rule of Civil Procedure 23.
6. This class is primarily defined as individuals who as "retail buyers" (as that term is defined by Minn. Stat. §168.66, Subd. 7) have executed a "Retail Installment Contract" (as that term is defined by Minn. Stat. §168.66, Subd. 4), on which Defendants failed to disclose the actual amount of money paid to the service contract company.
7. The members of the class are so numerous the joinder of all members is impracticable. While the exact number of the class is unknown to Plaintiff at this time and can only be ascertained through discovery, Plaintiff believes the class to number in the thousands since June 1994.
8. Common questions of law and fact exist as to all members of the class and predominate over any questions affecting solely individual members of the class. Among the questions of law and fact common to the class are:
 - a) whether Defendants misrepresented to Plaintiff and other consumers that the money it claimed was being paid to third parties on service contracts on their behalf was in fact not paid; and
 - b) whether Defendants' actions were in deliberate disregard for the rights of Minnesota retail buyers.

III. FACTUAL ALLEGATIONS

9. Plaintiff purchased a 1995 Ford Taurus, VIN # 1FALP52U8SG155076 from Defendant on or about July 26, 1997.
10. Defendant also sold to Plaintiff a credit life and credit disability insurance policy, as stated on the retail installment contract, for premium amount of \$1199.42 respectively. (See attached Exhibit 1).
11. Exhibit 1 does not provide, allow or disclose that any part of the total \$1199.42 premium will be retained as a kick-back or commission by the Defendant.
12. Defendant also sold to Plaintiff a service contract for \$1490.00. (See Exhibit 1).
13. Exhibit 1 does not provide, allow or disclose that any part of the vehicle service contract premium will be retained as a kick-back or commission by the Defendant.
14. Defendant completed a retail installment sales contract dated July 26, 1997, and included in the amount financed a credit life and credit disability premiums of \$1199.42, and a service contract of \$1490.00. (Exhibit 1).
15. Defendant specifically included as an agreement of the financing terms included in the retail installment contract that it would pay on Plaintiff's behalf a total of \$1199.42 and \$1490.00 to third parties for the credit insurance and service contract respectively.
16. Defendant misled Plaintiff when it attempted to disclaim its obligation to pay the money to third parties (knowing full well it would definitely retain a sum certain amount as its kickback).
17. Plaintiff relied on Defendant's representation that the amounts paid to the insurance company and the service contract company were \$1199.42 and \$1490.00, when in fact the amount paid

to these "others" was significantly less and therefore the amounts on the contract were not paid to others as stated.

18. As a result of the misstatements on the retail installment contract, Plaintiff suffered damages.

19. The Minnesota Court of Appeals on June 2, 2000, issued an opinion stating that the failure to disclose kickbacks and "commissions" on the sale by a dealership of credit insurance and service contracts/extended warranties is Consumer Fraud under Minn. Stat. §325F.68 et seq. and Common Law Fraud. See Sutton v. Viking Oldsmobile Nissan, Inc., No. C699281 (Minn. Ct. App. 2000).

IV. CAUSES OF ACTION

Count I.

VIOLATION OF THE DECEPTIVE TRADE PRACTICES ACT, MINN. STAT. § 325D.44

20. Plaintiff incorporates by reference paragraphs 1 through 19 as though fully stated herein.

21. Defendant by including in the retail installment contract that it will pay certain sums to third parties, when in fact it does not pay the entire amount to the third parties, creates a likelihood of confusion or misunderstanding and violates Minnesota Statute §325D.44(13).

22. Plaintiff seeks an injunction against all Defendants, prohibiting them from continuing to engage in the aforementioned deceptive trade practices under Minn. Stat. § 325D.45, subd. 1.

23. Plaintiff is also entitled to his costs and attorneys' fees pursuant to Minn. Stat. § 325D.44, subd. 2.

Count II.

VIOLATION OF THE CONSUMER FRAUD ACT MINN. STAT. § 325F.68 ET SEQ.

24. Plaintiff incorporates by reference paragraphs 1 through 23 as though fully stated herein.

25. Defendants' use of fraud, false pretense, artifice, false promise, misrepresentation, misleading statements and actions, or deceptive practices as stated more fully above, which specifically include but are not limited to, the material misrepresentations regarding the disposition of the credit life and disability insurance contract and service contract or extended warranty amounts to be paid on Plaintiff's behalf, constitutes an unlawful practice in violation of Minn. Stat. §325F.69 Subd. 1.
26. Specifically, Plaintiff lost the opportunity to bargain for a lesser price on the insurance and service contracts as well as the opportunity to refuse to purchase this item had Plaintiff known its true cost.
27. As actual damages Plaintiff is entitled to the return of the amount of the "commission" for the service contract that was improperly retained by Defendants, plus the interest that was paid on the "commission" over the life of the retail installment contract.
28. Defendants' violations of Minn. Stat. §325F.69 entitle Plaintiff to remedies pursuant to Minn. Stat. §8.31 including actual damages, together with costs and disbursements, including reasonable attorneys fees.

Count III.

UNJUST ENRICHMENT / MONEY ILLEGALLY RECEIVED / DISGORGEMENT

29. Plaintiff incorporates by reference paragraphs 1 through 28 as though fully stated herein.
30. Defendants and their employees have profited by their illegal conduct and have been unjustly enriched in an amount greater than \$50,000 in "commissions" and deceptively taken kickbacks.
31. Plaintiff seeks to force Defendants to disgorge the illegally received funds back to the Minnesota consumers who have paid them from June 1994 to the present.

Count IV.

BREACH OF CONTRACT

32. Plaintiff incorporates by reference paragraphs 1 through 31 as though fully stated herein.

33. Defendant breached the retail installment contract with Plaintiff wherein it represented to him that the credit life and credit disability premiums of \$1199.42, and a service contract of \$1490.00 would be paid on her behalf to the service contract company.

34. Defendant specifically did not pay the credit life and credit disability company \$1199.42 and the service contract company \$1490.00 it promised Plaintiff it would pay on his behalf.

35. Plaintiff has been damaged by Defendant's breach of contract in an amount to be proven at trial.

Count V.

PUNITIVE DAMAGES

36. Plaintiff incorporates by reference paragraphs 1 through 35 as though fully stated herein.

37. Defendant in the normal course of its business used form retail installment contracts which deliberately misrepresented to consumers that money for credit insurance and service contracts was paid to others when in fact Defendant knew that such amounts would not be paid to others.

38. That upper management of Defendant was aware of the misleading and deceptive forms being used and allowed the forms anyway.

39. That Defendant used the forms on its customers deliberately and intentionally in disregard for their rights to accurate and truthful information as provided by the Minnesota Consumer Fraud Act - §325F.68.

40. That as a result of Defendant deliberate disregard of Plaintiff and similarly situated customers' rights Defendant has violated Minnesota Statute §549.20.

WHEREFORE: Plaintiff prays that judgment be entered against the Defendant for the following relief:

- a. determine that Defendant intentionally violated Minn. Stat. § 325D.44;
- b. award injunctive relief pursuant to Minn. Stat. § 325.45, subd. 1, prohibiting Defendant from engaging in practices that confuse and mislead consumers in violation of the Deceptive Trade Practices Act, specifically, from inaccurately disclosing to consumers the amount that they pay to third parties for insurance contracts and service contracts or extended warranties and the amount they retain for themselves;
- c. award costs and attorneys' fees pursuant to Minn. Stat. § 325D.45, subd. 2;
- d. award Plaintiff's actual damages for Consumer Fraud and Breach of Contract in an amount to be proven at trial and their attorneys' fees and costs pursuant to MSA § 8.31, Subd. 1(a);
- e. award Plaintiff's costs and disbursements, including reasonable attorney fees pursuant to the statutes cited herein;
- f. award Plaintiff and the class punitive damages in an amount to be determined at trial; and
- g. award such other relief as may be just and equitable.

Dated this ____ day of September, 2001.

CONSUMER JUSTICE CENTER, P.A.

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ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.211 (1997), to the party against whom the allegations in this pleading are asserted.

THOMAS J. LYONS, JR.